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PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 220.

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JAMES H. McKENNEY,
Clerk.

N W. McDONALD, AS RECEIVER OF THE FIRST NATIONAL BANK OF ORLEANS, NEBRASKA,
Appellant,

v.

UNCEY DEWEY AND CHARLES T. KILLEN, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES P. DEWEY, DECEASED,
Appellees.

REPLY BRIEF OF APPELLANT.

F. M. HALL,
ROSCOE POUND,
E. E. PRUSSING,
Solicitors for Appellant,

MAIL JOURNAL CO., Legal Blank Manufacturers and Printers, Lincoln, Neb.

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JOHN W. McDONALD, AS RECEIVER OF THE FIRST NATIONAL BANK OF ORLEANS, NEBRASKA,
Appellant,
v.
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REPLY BRIEF OF APPELLANT.

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The cross-appeal of the appellees raises three points, namely, whether the bank was insolvent at the time of the transfers of stock; whether Dewey had actual notice that the bank was insolvent at the time he made the transfers; and whether Dewey's purpose in making the transfers was to avoid liability because of the known insolvency of the bank and the certainty that it would eventually go under.

I.

The bank was insolvent at the time of the transfers.

The Circuit Court expressly so found. At the beginning of the second paragraph on page 275, this finding appears and is clear and explicit. Moreover, the evidence on that point is convincing.

The First National Bank of Orleans was organized in 1885, with a capital stock of $50,000, as the successor of the Harlan County Bank, taking over all of its assets and assuming all of its liabilities. George W. Burton was the president of the bank and the owner of a large block of its stock from the day of its organization until its failure. A. E. Harvey was cashier of the bank until 1889. (A. E. Harvey's evidence, p. 117.)

J. A. Randall went to Orleans in 1889 and went to work for Burton & Harvey, who were not only running the bank, but were running in connection therewith a real estate and loan business. At the same time that Randall was working for Burton & Harvey, he kept the books of the bank. Randall became cashier of the bank in 1891 or 1892. He continued as cashier until July 1, 1895, when he resigned because he did not feel safe in occupying the position as cashier *because of the manner in which Mr. Burton was handling the funds of the bank for his own private use.* (Randall's evidence, pp. 9-64.)

In the fall of 1891, C. P. and A. B. Dewey and C. M. Hogg purchased 260 shares of stock in this bank, being a majority, for $26,000, from Burton & Harvey, sending to Burton & Harvey a draft for $10,268.63, and the balance of the purchase price was used in paying and discharging the obligations outstanding of Burton & Harvey. This

stock was divided among the three parties as follows: C. P. Dewey, 120 shares; A. B. Dewey, 120 shares; C. M. Hogg, 20 shares. March 8, 1892, C. P. Dewey sold to J. and G. Galbraith 10 shares of stock for $1,080 cash. April 23, 1892, C. P. Dewey sold to Charles McKenna, of Smithfield, Ohio, 5 shares for $550. (Randall's evidence, p. 180-1.) Thus at the time of the transfers, C. P. Dewey had 105 shares.

Following is a comparative statement showing condition of the bank March, 1893, and December, 1894: (C. P. Dewey's evidence, p. 219):

March 3, 1893.

Loans and discounts	$78,071 70
Deposits	71,216 21
Cash on hand	26,347 00

December 19, 1894.

Loans and discounts	$68,235 17
Deposits	39,522 19
Cash on hand	6,159 30

The per cent. of cash on hand to the deposits in the March 3 statement was 35 to 38 per cent. In the December 19 statement it was about 15 per cent. (C. P. Dewey's evidence, p. 219.)

December 17, 1896, deposits	$33,588 10
Cash on hand	3,585 78

When the bank failed, to-wit, May 20, 1897, it had assets as follows (Ex. 8, Trial balance, May 19, 1897, and P. O. Hedlund's evidence, pp. 1-23):

Cash in vaults	$102 03
In U. S. National Bank of Omaha	80 01
Banking house	13,260 14
Furniture and fixtures	2,433 09
Other real estate	4,560 88
Loans and discounts	65,838 42
U. S. bonds	12,500 00

Premiums	$265 25
Redemption fund	562 50
Total	$99,602 32

Out of these assets the receiver collected the following sums (Ex. 8, Trial Balance, May 19, 1897, and P. O. Hedlund's evidence, pp. 1-23):

Out of notes classed as good	$8988 45
Out of notes classed as doubtful	757 02
Out of notes classed as worthless	77 10
Balance in U. S. National	80 10
Redemption fund	560 00
Cash on hand	102 03
Real estate	1,813 14
Sale of balance all assets	300 00
Excess bonds over circulation	1,250 00
Total	$5,928 14
Realized out of	99,602 32

The deposits on this date were $32,785.20.

P. O. Hedlund, receiver, had lived in that section of the country for fifteen years, and was acquainted with practically all of the customers of the bank and the people to whom they had been loaning money. P. O. Hedlund says that after he was appointed receiver he examined thoroughly the bills receivable with a view to ascertaining the solvency of the makers and that he also traced the history of the bills receivable so as to know, in a general way, how long they had been in the bank, and he says that the bills receivable had not changed much as to amounts and persons during the three or four years prior to the failure of the bank; that the same notes, with interest added, made by the same parties, had continued from 1888 or 1889 without change down to the time of the closing of the bank. That he was personally acquainted with all makers of the large notes, and knew of their financial

standing and responsibility, and he gives it as his judgment that more than $50,000 of the paper that was held in the bank in 1894 was worthless and had been carried there through the years 1890, 1891, 1892, 1893 and 1894 up to the failure of the bank. (Hedlund's evidence, p. 105.)

Hedlund testifies further that the firm of Burton & Harvey was the principal debtor. They had been running a real estate and loan agency for many years in connection with the bank. Their indebtedness, one way or another, either directly or indirectly amounted to from $30,000 to $40,000. Then there was the Orleans College, that was carried for $1,000 that was worthless. Quite a number of men whose paper had been there for ten or fifteen years had notes amounting to between two and three thousand dollars. He was well acquainted with Burton and Harvey, had known them for many years, and was familiar with their financial condition, and testifies that they were insolvent in 1894. In order to avoid the excessive loans, Burton & Harvey, or George W. Burton and A. E. Harvey, carried loans in the names of various parties, to-wit, George W. Burton, A. E. Harvey, B. D. Mills, Mr. Hovey, who was Harvey's father-in-law, George W. Burton's wife, A. E. Harvey's wife, Mr. Burton's sister, Kirkpatrick, Neubauer, and J. A. Randall, and the Interstate Loan & Trust Company, which was owned entirely by Burton and Harvey. This concern had a note in the bank for $5,000 for six or seven years prior to the failure of the bank. The note of B. D. Mills was held by the bank as an accommodation note, for $2,000. The note of J. A. Randall was an accommodation note for Burton & Harvey, amounting to $2,900, and $1,000 that he had given for some stock in order that he might serve on the board of directors. All of these parties were insolvent and their notes were worthless, and all of their notes were in the bank at the time it failed. (Hedlund's evidence, pp. 105, 106, 107.)

It will thus be seen from the evidence thus far referred to that of the $50,000 capital of the bank, *it had $15,693.53 tied up in its building and fixtures, $4,560.88 in worthless real estate, and the balance was loaned to Burton & Harvey, directly or indirectly, not one dollar of which has ever been paid or could have been collected when the stock transfers were made.* (C. P. Dewey's evidence, p. 218.) All of this was true when Dewey transferred his stock.

During all the time that Burton & Harvey were owing the bank as set forth above, they were owing to C. P. and A. B. Dewey $22,000 and had conveyed to C. P. and A. B. Dewey practically everything they had for the purpose of securing it; and out of all of the securities that had been conveyed by Burton & Harvey to C. P. and A. B. Dewey to secure this $22,000 the latter only realized $4,000. A portion of the $22,000 that was loaned to Burton & Harvey consisted of advances from time to time by the Deweys to other creditors in the shape of interest payments on Burton & Harvey's indebtedness and was advanced for the purpose of keeping the creditors of Burton & Harvey from suing them and in that way embarrassing the bank. (C. P. Dewey's evidence, p. 218.)

A list of the notes held by the bank was furnished by J. A. Randall to C. P. Dewey from time to time. Such list was furnished by Randall to C. P. and A. B. Dewey January 14, 1894. This list of notes (C. P. Dewey's evidence, pp. 202-212) shows the

Note of George W. Burton for....	$829	50
and	4,168	00
M. F. Burton.....	5,000	00
A. H. Burton.....	1,149	80
and	542	00
A. E. Harvey.....	4,453	01
and	543	00
P. E. Hovey, Harvey's father-in-law	1,200	00
Interstate Loan & Trust Company	5,000	00

B. D. Mills	$2,000 00
H. Neubauer	1,387 15
J. A. Randall	2,900 60
and	1,000 00
S. B. Kirkpatrick and M. J. Kirkpatrick	1,387 50

This amounted to $32,539.96. In addition Burton had an overdraft of $7,000; and in addition to this, this list of notes showed that there were $4,000 in notes of various parties that had been due since 1891, $1,300 due since 1892, $4,280 due since 1893. On pages 53 to 56 of J. A. Randall's evidence there will be found a list of the bills receivable, amounts due the First National Bank of Orleans, Nebraska, December 1, 1894, and which remained in the bank at the time of its failure. The amount of notes that were in the bank at the time it failed as shown by this list is $64,123.66. Of this amount there were $56,297.56 of the same notes that were carried in the bank in December, 1894. The difference between the two amounts is the interest added between December, 1894, and May, 1897. No new loans were made by the bank during this interval except in the form of renewals of old notes. (Randall's evidence, p. 53.)

W. S. Morlan, a first-class attorney and business man, who had lived in and about Orleans for twenty years, and who had been actively engaged in the practice of law in that county, and who had an extensive acquaintance, examined this bank, in company with A. B. Dewey, in the early days of January, 1895, for the purpose of determining whether or not the bank was insolvent. At that time he examined all of the assets of the bank, and says that he was personally acquainted with nearly all the makers of the notes, and those that he did not know personally he advised himself about through inquiries from others, and he gave it as his unqualified opinion that the bank was, at that time, absolutely insolvent, and so advised A. B.

Dewey, and that he would be liable for an assessment of a hundred cents on the dollar on his stock. Thereupon A. B. Dewey disposed of the last ten shares that he had in his name to John W. Burton for $1,000, and took a note for the same. This is the testimony of an intelligent, competent, disinterested witness, who gives it as his unqualified opinion that the bank was absolutely insolvent. (W. S. Morlan's evidence, pp. 146, 147.)

Miss M. F. Burton says that she was assistant cashier of this bank for a while, and vice-president. She was vice-president when it failed, and was assistant cashier in December, 1894. She was a stockholder and director in the bank. She held $10,000 of stock in her name. She says that at the time C. P. and A. B. Dewey transferred their stock in the bank it was "*hard up*"; the deposits had fallen off; there were in the bank at that time a great many uncollectible notes. The financial condition of that part of the country was bad because of drought. All possible effort was made to collect the bills receivable. Values during the years 1894 and 1895 had shrunk almost to nothing. Most of the notes that were in the bank in 1894 remained uncollected and were in the bank when it failed. She gives a long list of notes that were in the bank in December, 1894, that had been inherited from the Harlan County Bank in 1885. This list amounts to the sum of $14,079. (M. F. Burton's evidence, pp. 138, 139.)

In addition to the other indebtedness in the form of notes of Burton & Harvey, they had an overdraft at the bank in January, 1893, of from $5,000 to $7,000. (Randall's evidence, p. 60.)

Commencing on page 69 of G. M. Lambertson's testimony will be found a large number of letters from the comptroller's office, complaining of various irregularities of the bank. We give some excerpts from these letters for the

purpose of showing the manner in which the bank was run and the nature and character of the various irregularities. (G. M. Lambertson's evidence, p. 69.)

On July 5, 1893, is a letter from James H. Eckles, comptroller, to J. A. Randall, complaining of the fact that the officers and directors of the bank have their notes in the bank for $28,836.71, out of a total loan of $82,000. (G. M. Lambertson's evidence, p. 70.)

October 10, 1893, in a letter from the acting comptroller to Burton, complaint is made that there is over $10,000 of past due paper. (G. M. Lambertson's evidence, p. 71.)

August 2, 1894, in a letter from the acting comptroller to Burton, complaint is made that there is over $12,000 of past due paper, and also complaint that there appears to have been over $8,795 of losses. (G. M. Lambertson's evidence, p. 72.)

In a letter of March 23 complaint is made that the $8,000 borrowed from C. P. Dewey, for which certificates of deposit are issued, were not listed among the bills payable nor so reported. (G. M. Lambertson's evidence, p. 74.)

On pages 75 to 88, will be found letters from the comptroller of the currency making constant complaint of irregularities such as worthless paper, excessive loans, and other matters of complaint in regard to the manner in which the bank was run. (G. M. Lambertson's evidence, pp. 75 to 88.)

J. A. Randall's evidence, pages 94 to 100, inclusive, gives a list of the notes in the bank December 1, 1894, that were worthless, being as follows (J. A. Randall's evidence, pp. 94 to 100 inclusive):

Beem	$1,705 00
Bowen	32 75
Randall	3,900 00
Brocker, Fritz	55 00
Cook, Geo. W.	54 25
DuBois, F. J.	58 00
Finley	172 70
Farrell & McDough	1,169 20
Gillilan	409 00
Hiatt, J. M.	45 00
Harvey, A. E.	243 09
Herald, Christ	55 65
Joyce, Patrick	45 00
Joyce, W. H.	31 00
Kirkpatrick, S. B. and M. J.	1,056 85
Lampson, J. T.	175 65
McNae	934 70
McKerr	563 37
Martin	152 85
Mills, B. D.	2,000 00
Orleans College	996 31
Prickett	267 30
Proper, Watts	659 56
Robertson, C. A.	108 60
Rabattone	10 60
Stowell	58 43
Simpson	52 15
Sitler, H. O.	700 00
State Bank of Republican City	750 00
State Bank of Republican City	1,000 00
Thomas	68 90
Trainer, J. W.	137 75
Vincent, N. B.	2,943 10
Warner, Geo. W.	1,596 04
Whitney, Chas. W.	185 12
Watson, R. H.	1,508 76
	$23,892 59

In addition to this there was in the bank at this time $30,000 of indebtedness of George W. Burton, A. E. Harvey or Burton & Harvey. There was tied up in the bank building and fixtures the sum of $15,693.23; there

was tied up in real estate that was absolutely worthless, the sum of $4,560.88. Thus we observe that *the bank at this time had lost every dollar of its $50,000 capital and in addition thereto the sum of $25,000 that belonged to the depositors, being the principal of all the money that was then on deposit in the bank.*

The following is a list of uncollectible notes in the First National Bank of Orleans, December 1, 1894, and which remained in the bank at the time of its failure as testified to by P. O. Hedlund, receiver (Hedlund's testimony, pp. 107-14):

Ayers, James	$14 75
Bowen, J.	25 00
Brown, W. C.	186 40
Beem, V. B.	1,705 00
Burton, M. F.	5,600 00
Burton, Geo. W.	279 50
Burton, Geo. W.	1,168 00
Burton, A. H.	1,149 80
Burton, A. H.	149 50
Burton, H. W.	1,000 00
Balcom, P. S.	15 00
Cramblett	80 00
on which was collected $55.	
Cook, G. W.	59 50
Dyer	13 85
Finley, O.	172 70
Farrell & McDonald	1,729 65
Farrell & McDonald	239 55
Gillilan, W. T.	381 00
Hiatt, J. M.	45 00
standing at $99.75 in 1897.	
Hovey, P. E.	1,200 00
Harvey, C. B.	4,553 01
Harvey, A. E.	543 00
Herald, Christ	55 65
Inter-State Loan & Trust Co.	5,000 00
Joyce	37 50
Jennings, Wm.	20 00
Joyce, W. H.	31 00

Joyce, M.	$22 70
Kirkpatrick, S. B. & M. J.	1,056 85
Longsine, Alex	51 40
Lampson, J. T.	175 65
Lover, John	9 50
McNeal, L. A.	934 70
McKee	563 37
Mohn, Benno	28 25
Martin, Philip	152 85
Mills, B. D.	2,000 00
Neubauer	1,387 15
Neufelt	33 43
Orleans College	996 31
Purdy, G. R.	22 00
Prickett, Byron	267 30
Poppert	31 00
Propper & Watts	695 56
Robertson	108 60
Stowell	58 43
Simpson	52 15
Soully, B. F.	95 00
Sitler, H. O.	700 00
State Bank of Republican City	1,750 00
Stitt, F. H.	54 80
Thompson, O.	16 00
Thompson, T. B.	68 90
Trainer, J. W.	137 75
Vincent, N. B.	1,443 10
Vincent, N. B.	1,500 00
Vallicott	344 00
Warner	391 67
Warner	1,204 37
Watson, R. H.	1,508 76
	$46,670 91

For the purpose of showing the manner in which the bank did business, we quote from the evidence of A. E. Harvey, p. 127:

"Ben Mills was president of the Republican City Bank. He held accommodation notes signed by me and Burton in his bank, and in consideration of that Mills gave us his

note for $2,000 to the Orleans Bank. I got nothing on the note put in his bank, and he got nothing on the note put in our bank. We simply swapped or exchanged notes."

"The list of notes handed me shows a total footing of $49,150.41. In my opinion $9,000 of the notes were reasonably good and might be called commercial paper December 1, 1894. The balance of the notes on the list would not be considered by business men as commercial paper." (C. T. Simpson's evidence, p. 143.)

"Business of all kinds is at a standstill. I doubt if there was corn enough raised in this country for seed, no small grain at all. With this condition of affairs, it would be folly to expect any business. There is not half feed enough to keep the stock through. Farmers have no money and nothing with which to get any. All we can do is to get along the best we can and keep things in as good shape as possible." (Hogg's evidence, p. 170.)

"I have had a long talk with Gen. Cobb. He thinks it would be a good plan for us to prepare a bill in equity and have it ready to file in the name of the bank against C. P. Dewey, the object being to subject the lands deeded to him to the payment of Burton & Harvey's indebtedness to the bank. No such an action as this can be brought until a receiver should be appointed. And in the meantime Dewey might have an opportunity to get away with the property. If the bank commences action the very day that it closes its doors the pendency of the suit would tie up the real estate and prevent its going into the hands of an innocent purchaser." (Harvey's evidence, p. 122.)

This letter shows that the failure of the bank was the thought uppermost in the minds of Burton & Harvey, the two men who knew most as to the condition of the bank.

"I called on Bartley this morning and he said that if possible he would let me have some money, and told me to call again, that he could not do anything for me until next week, when he said he would positively let me have a thousand dollars and maybe fifteen hundred for ninety days. I urged him to let me have the money today, but he could not. I then called on Harwood, president of the

First National Bank, for a thousand dollars until next week. I also called on Mayer Bros. for fifteen hundred dollars. I got $500 currency from Harwood after a long talk." (Harvey's evidence, pp. 130, 131.)

This letter from Harvey to Burton was in answer to Burton's letter in the form of an appeal for help and it simply shows how the bank at this time was scraping the bottom of the barrel and moving heaven and earth for a little currency with which to keep the bank floating, even pleading for a thousand dollars or five hundred dollars; all of which shows conclusively that the bank was on its last legs.

The following is a list of the depositors when the bank failed, which shows that *all the money they had was public money:*

Burton & Harvey	80 16
Beresford, A. M.	3 63
Bemis & Ostberg	213 87
State Treasurer	20,000 00
Coulter, J. M.	11 01
Christensen, Henry	5 00
Edwards, J. W.	1 90
Easterbrook, E. M.	1 50
Grafft, Emma	150 00
Hale, C. A.	8 93
Ireland, W. B.	9 00
Klugh, J. R.	10 44
McCulloch, D. A.	4,020 87
Munson, P. H.	7 72
McGeachin, Jas.	4 59
Newton, H. C.	283 75
Olson, B.	8 20
Ostrander, J. W.	5 20
Richards, Jesse	8 20
Shea, P. W.	28 24
Tibbets, Susa	1,200 00
	$27,978 31

Report of an Examination of the First National Bank, Orleans, Nebraska, made February 28, 1894, by J. M. Griffith, National Bank Examiner. (Randall's evidence, Exhibit 122, p. 232.)

"Only two formal meetings are held by directors a year, and apparently they know little regarding the inside workings of the bank, and the management is left entirely to the officers. They have no active discount and examining committees and no report is on file.

"Annual meeting was held on proper date, 480 shares represented. Mr. John A. Randall acknowledges to me that of the amount he owes $1,000 of it was given in payment of the 10 shares of stock he owns, and is not qualified to act as a director.

"In my opinion this bank will never be able to do a prosperous business until the president and his associates pay up what they owe the bank, and reloan the funds to outside parties, who will in return bring business to the bank. Mr. G. W. Burton I now learn induced Mr. C. P. Dewey and A. B. Dewey of Chicago to buy stock in this bank, and guaranteed all notes at face and interest, securing Messrs. Deweys by turning over to them all the assets of the Interstate Trust Co., as a guarantee of fulfilling their part of the agreement, so that I am informed by Cashier Randall that while there are 'bad debts' and other past due paper in the bank on which will probably occur losses, yet the stockholders will not sustain any loss by reason of Burton & Harvey having to make good these losses, and the sooner the Deweys require Mr. Burton to do this, the better it will be for the bank's interest. The bank is far from being in a satisfactory condition to an examiner, yet from all I can ascertain depositors' interests are safe, as A. B. Dewey and C. P. Dewey are financially able and so situated that they would have to carry this bank through any trouble, but the bank ought to stand on its own bottom, by arranging its affairs to do so.

"So far as I am able to ascertain their directors know little of what is in this bank, and only two formal meetings have been held without going over matters in the bank, and no mention is made of their examining and approving loans. The Dundy Bros.' excess loan as noted above is for purchase of feed cattle that parties are feeding, and cashier

claims that they have mortgage on cattle as security. From year to year as this bank is examined there is so many *continued* and *standing* loans and either directly or indirectly are the outcome of the private business of firm of Burton & Harvey, the president of this bank, Mr. Geo. W. Burton, being a member of that firm, and the amount when totaled figures over half their capital stock paid in as follows: Interstate Loan & Trust Co. (incorporated), $5,000; Geo. W. Burton, president, $4,997.50; A. E. Harvey, $4,996.01; M. F. Burton (sister of president), $5,000; A. H. Burton (wife of president), $1,691.80; J. A. Randall, cashier, $2,900.00; two mtg. notes, $1,063.50; making in all $25,648.81, and really the bank has no security for these loans, but about a year ago, when Mr. A. B. and C. P. Dewey bought an interest in the bank, Burton & Harvey guaranteed all loans, and secured them by turning over about all assets of the Trust Co. Burton & Harvey are really sole owners of that Co. and it is apparent that notes are so arranged as to avoid showing an excess loan in violation of the law, and interest is paid regularly, and loans carried along, but in my opinion all these loans should be paid up, and funds loaned to customers who will bring business to the bank. Other loans seem proper and right, being mostly farmers' notes in small amounts.

"Of notes listed as 'bad debts' I am of the opinion they will lose some $2,800, and on other overdue paper there is a loss of some $5,000; yet on account of the Deweys having a guarantee from Burton & Harvey the stockholders will not lose a cent, but these notes are not in bankable shape as they now are, and they should be paid and taken out of this bank by Burton & Harvey, and funds loaned to other parties, and Vice-Prest. C. P. Dewey and Director A. B. Dewey ought to require this to be done, for as losses now show there is apparently a small impairment of capital."

II.

Dewey had actual knowledge that the bank was insolvent when he made the transfers

C. P. and A. B. Dewey both attended the stockholders' meeting of the bank in January, 1892, when A. B. Dewey

was elected a director and C. P. Dewey was elected vice-president. They both continued to occupy these positions in the bank until the 1st of January, 1895. (See p. 29 of Exhibit 13, being the book containing the record of the meeting of the stockholders and board of directors of the bank. (C. P. Dewey's evidence, p. 91.)

At the meeting of the board of directors on January 12, 1892, the following resolution was adopted (p. 26 of Ex. 13, and p. 91):

"That C. P. Dewey, who has been elected vice-president of this bank today, be fully empowered to examine the books, accounts and assets of this bank, at any time he may so desire."

A. B. Dewey was elected a director on January 10, 1893, at a meeting of the stockholders of said bank, and on the same date, at a meeting of the directors of the bank, C. P. Dewey was elected vice-president. (P. 29 of Ex. 13, and p. 92.)

On January 9, 1894, A. B. Dewey was again elected a director and C. P. Dewey was elected vice-president of the bank. (Pp. 32, 33 of Ex. 13, and p. 91.)

C. P. Dewey was a man of large properties and varied experiences in the business world. He was cashier of the Harrison National Bank of Ohio, with a deposit account of over $700,000. (C. P. Dewey's evidence, pp. 219, 220.)

There was introduced, as a part of J. A. Randall's evidence, a large number of letters from C. P. and A. B. Dewey to George W. Burton, commencing on page 17 of Randall's evidence. We desire to give simply such excerpts from these letters as will bear upon the question of the insolvency of the bank, as well as of Burton & Harvey, and show Dewey's connection with the active management of the bank.

May 4, 1894, the Deweys, in a letter to Burton, say:

"After having advanced about $50,000 to help Burton & Harvey along we do not feel that we can make any further advances of money. * * *" (Randall's evidence, p. 20.)

January 16, 1894, C. P. and A. B. Dewey write to George W. Burton as follows:

"If the property does not sell for enough to pay off all claims, then the bank will have to bid in the property to protect itself. If it has a value of $1,500 as you say, then the bank had better get an assignment of the tax certificates. The bank is already loaded up with stuff not producing revenue, besides real estate far beyond what the law allows. We fear the comptroller will make a fuss about it." (Randall's evidence, pp. 23, 24.)

March 28, 1894, the Dewey's write (Randall's evidence, p. 27):

"We have just received a communication from the comptroller of the currency stating that on the 23d inst. he mailed our bank an important letter and asking us to read it. Will you please forward us a copy?"

February 5, 1894, they write to J. A. Randall (Randall's evidence, p. 28):

"Your favor enclosing statement of two Lincoln banks whose stock you hold as collateral for Mills' note. These banks do not seem to be particularly strong, and perhaps if their true condition was ascertained they might be worse than their statement shows."

Under date of March 26, 1894, the Deweys write to Burton (Randall's evidence, p. 30):

"We have simply been advancing large sums of money *to bolster up and keep Burton & Harvey and the bank running*, without having much voice in dictating how the money shall be applied. * * *"

Under date of May 15, 1893, the Deweys write to Burton (Randall's evidence, p. 39):

"When the bank examiner comes around and finds that nothing has been done regarding the payment of this note (Friedly note for $600) he is likely to make trouble, especially when he *finds so many other things not in accordance with the national banking laws.* Owing to the numerous bank failures throughout the country the examiner will be very particular when looking over your paper. * * * When we were in Orleans last we noticed that a note of one Friedly for $600, discounted by the bank for Burton & Harvey, had been sent off for collection and that the bank had nothing in lieu of this note except the attorney's receipt."

Under date of August 3, 1893, C. P. Dewey writes to Burton and Randall as follows (Randall's evidence, pp. 42, 43):

"Your favor of the 1st inst. received giving the condition of your cash resources and asking for some help. * * * I have been out to see what I could do myself. Money matters are extremely close here, and while our best banks are strong, they are not willing to make any new loans. I have written for $5,000 which has been ordered sent to you in currency from A. Castetter, banker, Blair, Nebr. You are to issue a certificate of deposit in the name of Mauerman for $5,000. You are also to send $7,500 of your best notes as collateral security, with power of attorney, authorizing me to make this and other loans, if necessary for the benefit of the bank, not exceeding $20,000. I would think it important for you to keep the bulk of your funds in your vault. I think it would be advisable to write to both of your correspondents and ask them if your bank can borrow $5,000 of each. I am inclined to believe that most of the trouble is over. I would like to have a daily report from you sent each day for a time."

September 2, 1893, C. P. Dewey writes J. A. Randall, cashier (Randall's evidence, p. 44):

"I enclose N. Y. draft for $3,000, payable on demand, drawing 8 per cent interest, for the protection of the bank.

Whenever you can afford the funds, return it to me. I can make greater interest here. You can put it in at $1,000 lots. After due deliberation we decided for the better security of the bank as well as ourselves, to record the deeds, of which you can notify Mr. Burton."

October 3, 1894, the Deweys write to Mr. Burton acknowledging the receipt of a deed to Burton's home farm, subject to mortgage of $12,000, which deed is not to be recorded until January 1, 1896. (Randall's evidence, p. 45.)

February 11, 1895, is a letter from C. P. Dewey to Mr. Burton saying (Randall's evidence, p. 49):

"I note from your letter that it will not be convenient for you to pay my certificates of deposit without borrowing. I will ask you to pay me $500 during the next ten days."

After January, 1892, A. B. Dewey was a director and C. P. Dewey vice-president, and J. A. Randall, the cashier, reported directly to them, and they gave a great deal of time and attention to the details of the bank. This fact will be shown by excerpts from the following correspondence (Randall's evidence, p. 19):

March 9, 1893, C. P. and A. B. Dewey write to George W. Burton (Randall's evidence, p. 19):

"These old claims that were entirely worthless were agreed by you to be taken care of and to be taken out of the bank, and this we will expect you to do. When there is any expense attending the collection of them it must be charged to Burton & Harvey and not left for the bank to pay."

May 4, 1894, C. P. and A. B. Dewey write to George W. Burton relative to certain threatened foreclosure suits by parties holding notes and mortgages of Burton & Harvey. Among other things this letter says (Randall's evidence, p. 21):

"After having advanced about $50,000 to help Burton & Harvey along we do not like to have them manifest more confidence in strangers than they have in us. We do not feel that we can make any further advance of money for their protection until they show a greater degree of confidence in us. * * * After having placed confidence in them to the extent of $50,000 it ill becomes them to show signs of suspicion."

December 22, 1893, C. P. and A. B. Dewey write George W. Burton advising him that they, in company with Mr. Hogg, are of the opinion that it is wise to pass the dividend that would be declared in December, 1893. (Randall's evidence, p. 23.)

January 20, 1894, C. P. and A. B. Dewey write to J. A. Randall calling for a report of the two Lincoln banks, whose stock was held by the Orleans bank to secure B. D. Mills' note, and criticising the loan by the bank to individual parties of large amounts, and asking them to change the policy of the bank suggesting that it is better to have a thousand dollars loaned to ten different men than to one. (Randall's evidence, p. 24.)

January 30, 1894, C. P. and A. B. Dewey write to George W. Burton relative to the manner in which the funds should be used in the bank belonging to Burton & Harvey, and asking that all such moneys shall be applied upon the indebtedness of Burton & Harvey to C. P. and A. B. Dewey. (Randall's evidence, p. 25.)

April 13, 1894, the Deweys write to Burton returning to them the comptroller's letter that had been sent them for their examination and inspection. (Randall's evidence, p. 27.)

February 5, 1894, C. P. and A. B. Dewey write to Randall urging him to press Mills for payment on his note, asking him to pay $500 or $1,000, and to do the same with

all the other large borrowers of the bank, suggesting to him that this is necessary because the Cadiz people, who had some money in the bank, would draw it out in the spring; and also asking if the Pat Gibbons note, which was for $3,000, had yet been paid.

March 15, 1894, is a letter from the Deweys to Burton suggesting the manner of keeping certain accounts in the bank and asking for an account of sales of lands, etc. (Randall's evidence, pp. 29, 30.)

July 31, 1894, C. P. and A. B. Dewey write to George W. Burton relative to the propriety of denationalizing the bank, and referring to the fact that Burton is unable to meet an interest payment of $360 due September 1, 1894, on a $12,000 farm loan, together with the taxes for 1893, and saying (Randall's evidence, pp. 31, 32.)

"It only shows the necessity of your making an effort to borrow some money from banks and to pay us off; then we would be willing to advance this interest and taxes for you, as mentioned; but we will not advance any more money until our claim is paid. * * * It is useless to suggest the denationalizing of the bank."

December 4, 1893, C. P. Dewey writes (Randall's evidence, p. 32):

"I have taken up your certificate for $5,000 to Mauerman. You may send me five certificates for $1,000 each, payable on demand, with eight per cent interest. At any time that you have funds and can pay any part of this please do so."

September 20, 1893, C. P. and A. B. Dewey write to Geo. W. Burton (Randall's evidence, p. 33):

"Your plans for liquidation as mentioned in yours of the 11th inst. we have not yet so fully investigated as to be able to give you a definite reply. Will write you about this later."

August 28, 1894, the Deweys write to Geo. W. Burton as follows (Randall's evidence, pp. 44, 45):

"We received your letter enclosing your two notes of $180 each which you ask us to take and furnish you enough money to pay the six month's interest on your $12,000 loan due September 1st next. We return these notes. We are not willing to advance you any more money unless you properly secure us." (Randall's evidence, p. 45.)

At this date the First National Bank of Orleans held $30,000 of Burton's paper, entirely unsecured, as they knew.

October 3, 1894, C. P. and A. B. Dewey write a letter to George W. Burton acknowledging the receipt of a quit-claim deed for Burton's home farm, in consideration of which they were to advance him $360 to pay the interest due September 1, 1894, on a $12,000 mortgage. But, *did the Deweys expect that Burton would pay his $30,000 owing to the First National Bank when he was unable to pay the interest on a $12,000 farm loan mortgage, and they had advanced him the money to pay the interest, but before doing so required a deed to the farm?* (Randall's evidence, p. 45.)

December 22, 1894, C. P. Dewey writes to J. A. Randall enclosing for payment a certificate of deposit of $1,000 and asking for some of the printed slips of their last bank statement December 19, 1894. (Randall's evidence, p. 48.)

During the years 1893 and 1894, C. P. and A. B. Dewey wrote to J. A. Randall and George W. Burton relative to matters in this bank weekly and sometimes oftener, and these letters will all be found as a part of the evidence of J. A. Randall.

These letters show that C. P. and A. B. Dewey refused to make any further advances to Mr. Burton in the way of

loans, and at the same time they knew that they had deeds of conveyance to all of the property that Burton & Harvey had, and they also knew that Burton & Harvey owed the bank more than $30,000 and that the bank had absolutely no security for the payment of any of their notes. In other words, they seemed to be willing that Burton & Harvey should owe the bank $30,000 without security, but refused to advance Burton & Harvey any money without having ample security for it.

These letters show that the Deweys had a perfect insight into the condition of the bank and the manner in which it was being conducted, and were supervising and superintending the manner in which the business of the bank was to be managed, and required Mr. Randall, the cashier, to report practically everything to them at their office in Chicago, and to furnish them a daily trial balance, and they were fully posted as to what was going on in the bank, so that it might be said truthfully that both the Deweys were engaged in the active management of the bank, and directed the policy and the whole affair. The Deweys, with their relative, Mr. Hogg, owned a majority of the stock, and it might be said that the whole management and control of the bank was in their hands. They saw to it that Burton & Harvey turned over to them everything they had to secure the $22,000 that they had advanced from time to time for Burton & Harvey. They should have been equally vigilant in seeing that Burton & Harvey's indebtedness to the bank was also secured.

C. P. Dewey testified that during the fall of 1893 he loaned the First National Bank of Orleans $5,000. That was a personal loan entirely, and the bank issued a certificate for $5,000. This was taken up December 9, 1893. On September 5, 1893, he loaned in the same form $3,000. This is the loan that is referred to in the letter of C. P. Dewey to Geo. W. Burton under date of August 3, 1893.

It is disclosed in this letter that the $5,000 certificate was secured by $7,500 of the best notes of the bank as collateral. It thus appears that Mr. Dewey himself was unwilling to loan or advance any money to the bank in the fall of 1893, without being amply protected and secured. He could not have had a very high idea of the ability of the bank to pay its debts. (C. P. Dewey's evidence, p. 185.) (Randall's evidence, pp. 142, 143. Letter, p. 42.)

C. P. Dewey says (C. P. Dewey's evidence, p. 186):

"I did not learn that there was any question of the solvency of the First National Bank of Orleans, Nebraska, until the bank closed its doors in 1897. * * * At the time I was negotiating for the purchase of this stock there was a personal investigation made as to the bank by a representative that we sent there. When we bought the 260 shares of stock Burton & Harvey personally agreed to assume and guarantee the payment of all bills receivable in the bank, and we considered their guarantee entirely good. I made thorough examinations of the affairs of the bank from frequent statements, and we attended their annual meetings for several years after we bought the stock. We investigated their bills receivable from time to time, and they seemed all right."

C. P. Dewey says (C. P. Dewey's evidence, p. 187):

"Prior to 1896, I did not receive any information as to the character of these various bills receivable or any other bills receivable which the bank held other than I received by these papers which have been introduced, except what John A. Randall and Burton told me, and they assured me at all times that they were good. I did not receive any information that they were bad. At those annual meetings I made an examination, only in a general way, asked questions of the cashier and president, and assistant cashier."

The uncontradicted evidence shows that C. P. Dewey was furnished with an itemized list, giving the names of makers and amounts of all the notes in the bank, and each

one of these lists always showed notes of Burton or Burton & Harvey for about $30,000; all of which C. P. Dewey knew were absolutely worthless, as he held all of the property of Burton & Harvey to secure his and A. B. Dewey's indebtedness.

The first dividend was passed by the bank December 22, 1893. The bank paid no dividend for a year before C. P. Dewey sold his stock. From this statement it will be seen that no dividends were paid after July, 1893. (Testimony of Chas. Killen, p. 226.)

III.

Dewey's purpose in making the transfers was to avoid liability because of the known insolvency of the bank and the certainty that it would eventually go under.

The following is a list of the real estate for which Mr. Dewey exchanged his 105 shares of bank stock, including the 20 shares of C. M. Hogg.

December 10, 1894, he purchased from L. Eberhart, R. Dubbs, and Albert C. Kindig, lot No. 2, in Eberhart, Robinson & Good's Subdivision of the east half of the southwest quarter of the northeast quarter of section 14, township 38, range 13, being a part of the Chicago Lawn property. Consideration was $12,000. It was paid:

By conveyance of quarter section of land in Rawlins county, Kansas, which was valued at	$1,500 00
Incumbrance assumed	5,000 00
Thirty-five shares of stock in Orleans Bank	3,500 00
Cash	2,000 00

On December 14, 1894, he made purchase from Jules W.

Jouvenat of lots 1, 2, 3 and 4 in J. O. Bryant's Subdivision of lots 5 and 8 in Conrad Seipps' Subdivision of the west half of the northwest quarter of section 25, township 38, range 14, Cook county, Illinois. Consideration $11,000, paid as follows:

Twenty shares of bank stock	$2,000 00
Assumed master's certificate	5,500 00
Half section of land in Dundy county	3,500 00

This Dundy county land was worth $700. Frank Israel of Dundy county, who was a real estate man and familiar with the land, thus fixes its value. The value of the Rawlins county land was $300, as shown by the evidence of F. E. Robinson and R. S. Hendricks. (Pp. 256, 257.)

On December 29, 1894, Dewey purchased from R. Dubbs and A. C. Kindig lots 1 to 12 and 19 to 25, inclusive, and 29 to 34, inclusive, and lots 41 to 46, inclusive, in block 3, in Eberhart, Robinson & Good's Subdivision of the east half of the southwest quarter of the northeast quarter of section 14, township 38, range 13, in the city of Chicago, Cook county, Illinois. Consideration for these lots was $9,000, paid as follows (pp. 164-5-6):

Bank stock, 30 shares	$3,000 00
Incumbrance assumed	4,000 00
Cash paid	2,000 00

January 10, 1895, Mr. Dewey purchased from Charles H. Killough lot 85 in Longwood's Subdivision, in the southeast quarter of section 6, township 37, range 14, and also lots 23 and 24, in block 10, in Ashland Subdivision of the north three-fourths of the east half of the northeast quarter of section 18, township 38, range 14, all in Cook county, Illinois, for a consideration of $8,250, paid as follows (pp. 164-5-6):

Bank stock, 30 shares	$3,000 00
Incumbrance assumed	1,500 00
Cash paid	3,750 00

On January 9, Mr. Dewey bought from Emile Jouvenat

lots 63, 64 and 65 in block 1, Richard S. Cook's, Jr., Subdivision of ten acres in the southeast quarter and the southwest quarter of section 17, township 38, range 14, Cook county, Illinois. Consideration $1,300, which was paid as follows (pp. 164-5-6):

Ten shares of bank stock	$1,000 00
Incumbrance assumed	900 00

C. P. Dewey had *advertised this stock for trade* for Chicago real estate, and he traded his stock to L. Eberhart, H. Dubbs, and Albert C. Kindig, Jules W. Jouvenat, Charles H. Killough and Emile Jouvenat. The following evidence from F. S. Eberhart, Levi Eberhart, Charles Jouvenat, Charles H. Killough, will show how they regarded the stock at the time of the trades. (F. S. Eberhart's evidence p. 148.)

F. S. Eberhart was the son of Levi Eberhart. Levi Eberhart was a member of the firm known as Eberhart, Dubbs & Kindig. The son, F. S. Eberhart, traded Chicago real estate for sixty-five shares of C. P. Dewey's stock. *His attention was directed to Mr. Dewey's stock being for trade or sale through an advertisement in the Chicago Tribune.* He made the trade direct with Mr. Dewey and was told that the stock belonged to Mr. Jewett. His first trade concerned $12,000 nominal value of real estate in Chicago. Mr. Dewey traded for it and paid for it as follows (pp. 152-3):

Incumbrance assumed	$5,000 00
Cash paid	2,000 00
First National Bank stock	3,500 00
160 acres of land in Rawlins county, Kansas	1,500 00

Mr. Eberhart says the chief inducement for making the trade and getting rid of the Chicago real estate was on account of the $5,000 encumbrance which they had hard work to pay the interest on. That they made no inquiries

as to the bank stock, or its value; did not know the amount of deposits; wrote no letters concerning it. That Mr. Dewey made no representations of any kind except that he showed them a printed report. Did not know at the time that he traded for the stock that the bank paid no dividends; made no inquiries relative to the Rawlins county land or its value; was not personally interested in the deal himself, but made it for Eberhart, Dubbs & Kindig; that the bank stock was divided evenly between Eberhart, Dubbs and Kindig, each taking one-third. (F. S. Eberhart's evidence, pp. 148, 149.)

Levi Eberhart was the father of F. S. Eberhart and seventy-nine years of age, engaged in the real estate business. He had nothing to do with the real estate trades whereby their firm got the bank stock; the business was all attended to by his son, F. S. Eberhart. He made no inquiries relative to the value of the bank stock, and had nothing upon which to base a judgment as to it except the printed report. That the principal inducement for trading the real estate and taking the bank stock was that the property was on a downward tendency and they were anxious to get rid of the incumbrance on the property, because they were unable to pay the interest, and at the same time to get what cash they could out of the transaction. That *they placed no particular value upon the bank stock, but thought that if they could get anything out of it it would be all right, and if not, they would simply have to do the best they could.* (Levi Eberhart's evidence, pp. 152, 153.)

Charles Jouvenat was the father of Jules Jouvenat and the brother of Emile Jouvenat. The sale to Jules Jouvenat was conducted by E. P. Davis, the real estate in this transaction belonging to Charles Jouvenat, but the bank stock was taken in the name of Jules W. Jouvenat. In this transaction neither Charles nor Jules W. Jouvenat knew

anything about the First National Bank of Orleans or the value of its stock or the condition of the bank, except what was shown by a printed statement. The trade with Emile Jouvenat for a consideration of $1,900 was conducted by his brother, Charles Jouvenat. No satisfactory reason is given by Charles Jouvenat as to why he bought the bank stock in his son's name. (Chas. Jouvenat's evidence, pp. 227, 228.)

Chas. Jouvenat says that the chief object in making both of these trades was to get rid of the incumbrance; that the interest was due, and that they were not able to pay it. There was a master's certificate on the property; that is, the property had been foreclosed and the time for redeeming the property had about expired, and these people, being unable to raise the cash, made the trade. (P. 229.)

The following is a statement of all of the facts and dates connected with the transfer and retransfers of the stock of C. P. Dewey to Jewett and of A. B. Dewey to the Shufelts:

January 26, 1893, C. P. Dewey endorsed certificate No. 52 for 50 shares, certificate No. 62 for 40 shares, and certificate No. 76 for 15 shares. On February 6, 1893, there was written across the face of each one of these three shares the word "cancelled."

On the same date of the cancellation of the three certificates above named there was issued in lieu thereof the following certificates: No. 84 for 95 shares to F. L. Jewett; No. 85 for 10 shares to C. P. Dewey. These two certificates cover the same stock that was represented by Nos. 52, 62, and 76.

On the same date, to-wit, January 26, 1893, A. B. Dewey endorsed certificates No. 53 for 50 shares, No. 61 for 40 shares, No. 74 for 25 shares; and these certificates were all

marked across their faces with the words "cancelled, February 6, 1893."

On the same date of the cancellation of these three certificates there were issued the following certificates in lieu thereof, to-wit: Certificate No. 81 for 50 shares to H. H. Shufelt; certificate No. 82 for 55 shares to A. H. Shufelt; certificate No. 83 for 10 shares was reissued to A. B. Dewey.

This left both C. P. and A. B. Dewey owning 10 shares each. If there was no concert of action between the Deweys and no understanding in regard to the stock, how did it happen that they each endorsed their three certificates on January 26, 1893, and that all of said certificates were cancelled by the bank on the same date, to-wit, February 6, and that then the stock certificate to F. L. Jewett No. 84 for 9 shares and No. 85 for 10 shares, and the certificate to H. H. Shufelt and to A. H. Shufelt and to A. B. Dewey should all be dated and reissued on exactly the same date, to-wit, February 6? The matter does not stop here. On September 5, 1893, Jewett endorsed his certificate No. 84 for 95 shares. It was surrendered to the bank and cancelled on September 8; and on the same date there was reissued to C. P. Dewey certificate No. 88 for 95 shares.

September 14, 1893, H. H. and A. H. Shufelt surrendered their certificates No. 81 for 50 shares and No. 82 for 55 shares, and they were cancelled on that date and reissued to A. B. Dewey in certificates No. 89 for 50 shares, No. 90 for 30 shares, and No. 91 for 25 shares. By the September transactions all of the stock formerly held by C. P. and A. B. Dewey was retransferred to them by Jewett and the Shufelts, and there was only six days difference between the dates of the issuance of the stock certificates to A. B. Dewey and C. P. Dewey. Both of these men continued

to hold their stock certificates until the 4th day of May, 1894, when we find that C. P. and A. B. Dewey both endorsed their various certificates on the same day, to-wit, May 4, 1894; their certificates were cancelled on the same day, to-wit, May 7, 1894, and on the same date new certificates were issued in lieu thereof as follows:

Certificate No. 92 for 30 shares, and certificate No. 93 for 25 shares and certificate No. 94 for 50 shares to A. H. Shufelt; and certificate No. 95 for 95 shares to Fred L. Jewett.

It is not within the range of human possibilities to suppose that the various certificates of C. P. and A. B. Dewey could have been endorsed, cancelled, transferred, and retransferred all on the same date without a previous arrangement and agreement between the parties. A. B. Dewey says that there was an arrangement and consultation and agreement and understanding between himself and C. P. Dewey relative to all of those transfers and that explains the reason why they were made on the same date.

The following is a complete history of the transfer from F. L. Jewett to his immediate transferees, including the 105 shares of the original C. P. Dewey stock, and the 20 shares purchased by Dewey from Hogg December 20, 1894 (pp. 2, 3):

December 13, 1894, F. L. Jewett surrendered certificate No. 95 for 95 shares, which was reissued to himself in the following certificates: No. 96 for 5 shares, No. 97 for 5 shares, No. 98 for 5 shares, No. 99 for 10 shares, No. 100 for 10 shares, No. 101 for 10 shares, No. 102 for 10 shares, No. 103 for 20 shares and No. 104 for 20 shares.

December 26, 1894, C. M. Hogg surrendered certificate No. 60 for 20 shares, which was reissued to F. L. Jewett —See certificate No. 105.

December 29, 1894, F. L. Jewett surrendered certificate

No. 103 for 20 shares, which was reissued to Jules W. Jouvenat—See certificate No. 106.

On the 10th day of January, 1895, F. L. Jewett endorsed and transferred the following certificates to Charles H. Killough: No. 96 for 5 shares, No. 97 for 5 shares, No. 100 for 10 shares, No. 101 for 10 shares. But these certificates were not returned and cancelled, and new certificates issued to Charles H. Killough, but on the 6th day of February, 1895, Charles H. Killough attaches an assignment to these same certificates assigning them to J. G. Hatcher. Hatcher did not have the old certificates cancelled and new certificates issued to him, but he reisued all of these certificates to C. C. Hatcher on the 13th day of February, 1895. These old certificates were returned and cancelled on February 21, 1895, and were reissued on that date to C. C. Hatcher as follows: Certificate No. 134 for 10 shares, No. 135 for 10 shares, No. 136 for 5 shares, No. 137 for 5 shares.

March 4, 1895, F. L. Jewett surrendered the following certificates: No. 109 for 5 shares, No. 110 for 5 shares, which were reissued to Emile Jouvenat in the following certificates: No. 138 for 5 shares, No. 139 for 5 shares.

December 18, 1895, F. L. Jewett assigned certificate No. 104 for 20 shares to L. Eberhart, who in turn assigned the same certificate to A. C. Kendig, to whom certificate No. 148 was issued for 20 shares. No. 148 is dated January 9, 1896.

January 3, 1895, Jules W. Jouvenat surrendered certificate No. 108 for 10 shares, which was reissued to Eli K. Gougar—See certificate No. 141.

A. B. Dewey testifies that soon after the Deweys came home from the stockholders' meeting of January 10, 1893, A. B. and C. P. Dewey had a conversation relative to the transfer of their stock in the bank. The result of that

conversation was that A. B. Dewey was to consult their attorney, E. F. Runyan, in regard to the matter, and he advised them that all they had to do to evade their liability as stockholders was to put their stock in the name of someone else; and on the 6th day of February C. P. Dewey transferred ninety-five shares of his one hundred and five shares to his stepson, Fred L. Jewett, the certificate of stock being endorsed on the 26th day of January, 1893. On this same date, to-wit, January 26, 1893, A. B. Dewey endorsed three of his stock certificates to his relatives H. H. and A. H. Shufelt. All of these stock certificates were marked across their face "Cancelled, February 6, 1893."

A. B. Dewey was advised by their attorney, E. F. Runyan, that all that was necessary to evade their liability was to transfer their stock to some other party; he communicated this advice to C. P. Dewey and these transfers to the Shufelts and to Jewett by the two Deweys were made pursuant to this advice, in a few days after they had received this advice. * (A. B. Dewey's evidence, pp. 156, 157.)

A. B. Dewey says that they were led to talk over the matters in which they were interested in connection with this bank because of the tightness of the money market, of the number of banks that had failed, and the bad conditions of the west that were so injurious to all the banks, and because of the condition in which they found the paper of the bank at their examination in January, 1893. (A. B. Dewey's evidence, p. 157.)

Jewett continued to hold the ninety-five shares of C. P. Dewey, and the Shufelts continued to hold A. B. Dewey's stock until September, 1893, when the Deweys were importuned by Burton, president of the bank, to have their stock retransferred to themselves because it was injuring the bank. (A. B. Dewey's evidence, p. 158.)

The Shufelts and Jewett retransferred their respective

holdings to C. P. and A. B. Dewey on the 14th day of September, 1893, after a personal conference between the Deweys. Burton wrote to the Deweys that it was absolutely necessary for them to take this stock back in their own names, owing to the panicky condition of the country and in order to give the bank credit. Both the Deweys agree on this statement as to the reasons why they took back their stock in their own names. The matter stood thus until the 4th day of May, 1894, when C. P. Dewey and A. B. Dewey both indorsed their stock certificates on the 4th day of May, 1894; across the face of each stock certificate is written the words "Cancelled May 7th, 1894"; and at this time C. P. Dewey transferred his ninety-five shares to Fred L. Jewett again, and A. B. Dewey transferred his 105 shares of stock to A. H. Shufelt. Prior to this transfer the Deweys had another conference, when they talked about the propriety of making these transfers. The conditions in the west were getting worse, and they were somewhat alarmed about the outcome of the bank. The situation was the subject of serious conversation. C. P. Dewey said: "We had better be damned"; he said, "We had better get out of the thing." A. B. Dewey coincided in that opinion (A. B. Dewey's evidence p. 159):

"It was decided what we should do; that we had best make the transfer. There was a long conversation about the condition of both Burton and the bank. Burton kept writing about the condition of the bank and wanted to denationalize; that something had to be done, as the comptroller was after him constantly. So that we concluded that it was best to transfer the stock. The object of making the transfer was to get rid of the double liability on the stock."

A. B. Dewey went to C. P. Dewey prior to the January meeting in '95 and said: "I wish you would take my proxy out and vote my stock." He said he would not be able to attend the meeting, and I had better send mine out and he would do the same. I sent my proxy out. This was in

December, 1894. I sent my proxy by letter to Mr. Burton and stated that C. P. Dewey would send his out to be voted at the annual meeting, and then it was I had a letter from Burton from which I learned for the first time that C. P. had commenced a disposition of his stock. I did not know that. He had not told me that he was going to sell, and it was a great surprise. I thought we were acting together in the investment; so I immediately went out. (P. 160.)

A. B. Dewey went to Orleans, Neb., to attend the January meeting of the stockholders, and it was then that he learned for the first time that C. P. Dewey had transferred his stock, that stood in the name of Fred L. Jewett, to other parties. He had not conferred with his brother, A. B. Dewey relative to these transfers, and it was a great surprise when A. B. Dewey found this condition of affairs. (A. B. Dewey's evidence, pp. 106 to 161.)

A. B. Dewey says that at this trip he had W. S. Morlan, an attorney of McCook, a man of wide experience and great familiarity with affairs in the west, and with an extensive acquaintance with the customers of the bank, go over the notes held by the bank, and that Morlan gave it as his opinion that the bank was absolutely insolvent; and A. B. Dewey while there disposed of his remaining ten shares of stock in the bank in order to get rid of it, and took a worthless note for the same. (A. B. Dewey's evidence, p. 161.)

A. B. Dewey had a letter from Burton in December, 1894, intimating to him that C. P. Dewey was selling, or had sold, his stock, to other parties than Jewett. (A. B. Dewey's evidence, p. 161.)

A. B. Dewey says that he found on inquiries from others that the notes of the bank were no good, that they were worthless, that Burton & Harvey were heavily in debt, and

in order to keep up the bank had to borrow money from the Deweys in order to pay their individual indebtedness to outsiders, to keep them from closing in on Burton & Harvey and closing the bank. (A. B. Dewey's evidence, p. 162.) When the Deweys and Hogg bought the $26,000 of stock in the bank, it was supposed that that would clear up all the indebtedness of Burton & Harvey, but the Deweys found to the contrary. They found new indebtedness continually bobbing up, and that indebtedness was far in excess of what Burton & Harvey had represented it. The Deweys were then compelled to advance more money in order to protect the bank, and the matter continually got worse instead of better. C. P. Dewey said himself that he thought that the statements of Burton in regard to the bank were overestimated, and he thought the whole business was a good deal of "chips and whetstones." (A. B. Dewey's evidence, p. 163.)

C. P. Dewey denies the material statements of A. B. Dewey, denies that they had any conversation or conferences relative to the transfers of their stock; but A. B. Dewey's evidence is corroborated by the almost unanswerable circumstances that they both transferred their stock and endorsed their certificates on the 26th day of January, 1893. Their stock certificates had the words "cancelled" on the face of each one of them, "February 6th, 1893." The Shufelts and Jewett retransferred to both of the Deweys on the same date in September, 1893, and on the same date, to-wit, May 4, 1894, the Deweys both indorsed their certificates of stock, and they are cancelled on the same date, to-wit, May 7, 1894. It is not possible that these various transfers of so many different certificates of stock could have taken place on the same day by mere chance. There must therefore have been conversations, conferences, and concert of action between the Deweys. C. P. Dewey, in his testimony taken at Manhattan, Kan., attempts to break down the force of this circumstance by saying that he and

A. B. Dewey were not on speaking terms during 1893 and 1894, and that his private clerk, Mauerman, must have kept A. B. Dewey posted or advised as to what he was doing, and that A. B. Dewey did the same thing. These transactions cannot be explained or accounted for in this way, because their stock certificates reached the bank at Orleans on the same date and were there cancelled on the same date by the officers of the bank, and new stock certificates were reissued on the same date. This happened in the first transfers from the Deweys to Jewett and Shufelt, and in the transfers from Jewett and Shufelts back to the Deweys, and again in the transfers from the Deweys to Jewett and the Shufelts. In addition to this, Mauerman testifies (Mauerman's evidence, pp. 250-255), that the Deweys were on most intimate terms and their relations were perfectly agreeable until December, 1894, and that they were in daily conference, lunching together, visiting together, conferring together about all of their partnership matters that were then pending and unsettled. That A. B. Dewey was a daily visitor at the office of C. P. Dewey, and that their relations were most cordial. To be sure, he says, they would have differences of opinion relative to certain business transactions, but when the matter was over and disposed of, there was no further feeling or thought in regard to it. In Mauerman's evidence he cites an instance where C. P. Dewey closed up a transaction for A. B. Dewey involving over a hundred thousand dollars, in September, 1894, and introduces a letter written by C. P. Dewey to A. B. Dewey in regard to these transactions in which C. P. Dewey addresses A. B. Dewey as "My Dear Brother," and closes up his letter, "Affectionately, Charlie." From this it must be apparent to the court that C. P. Dewey had the same knowledge relative to the condition of this bank that A. B. Dewey had. A. B. Dewey says that he knew it was insolvent and transferred his stock to evade his liability; and when he was sued he confessed the fact and paid up. (A. B. Dewey's evidence,

p. 164, pp. 263-268, pp. 155-163.) Hence we submit that when C. P. Dewey says that he never knew anything about the bank being insolvent until it failed, he certainly is not speaking the truth.

C. P. Dewey was a man of wide and varied experiences in the business world. He had been cashier of a large bank, he was therefore familiar with accounts, and being an intelligent man and a man of experience, he could very readily tell from an inspection of the bank as to what condition it was in financially. The fact is that C. P. Dewey transferred his stock to his step-son, Fred L. Jewett, under poor advice from an attorney, and with the understanding that all he had to do to escape his liability as a stockholder was to put his stock in the name of someone else; and this explains why it was that the stock was transferred to Jewett; and he possibly learned from a better legal adviser in December, 1894, that that would not be sufficient, and hence it was that he had Jewett trade his stock for Chicago real estate.

Let us now look at the manner in which C. P. Dewey traded his bank stock for real estate. (P. 270.)

On December 7, 8, and 9, 1894, he advertised his bank stock in the *Chicago Tribune* for trade for real estate, offering to assume incumbrance, and did exchange all his bank stock, to-wit, 105 shares, and twenty shares that belonged to Charles M. Hogg, for Chicago real estate, putting in a half section of land in Dundy county, Nebraska, in one trade, at $3,500, which land Israel testifies was worth $500; and in another trade putting in a quarter section of land in Rawlins county, Kansas, for $1,500, that was worth, probably, $300. In each instance he assumed an incumbrance that the owners were unable to pay, and the people with whom he traded in each instance testified that they knew nothing about the bank stock, and paid very little attention to it, and placed very little value upon

it, and that the principal inducement to the trade was to get rid of the incumbrance and get what cash they could, being unable to pay the incumbrance or the interest thereon, and that they paid little or no attention to the value of the Dundy county and the Rawlins county lands; they simply took them for what they were worth, and took their chances on it. They knew nothing about the bank nor its condition nor whether it paid dividends, and paid very little, if any, attention to the value of the bank stock or the real estate that they received in exchange for their property. (C. T. Killen's evidence, pp. 222, 223.)

C. P. Dewey was furnished, a large portion of the time, at least during 1893 and 1894, with daily reports from Randall the cashier. He and A. B. Dewey were in almost weekly communication by correspondence with Randall as to the condition of the bank. Under date of August 9, 1893, C. P. Dewey, writing to J. A. Randall, says (C. P. Dewey's evidence, p. 43):

"It takes only a few moments to compile a statement of your cash balances, and I would like to hear from you every day, if possible, giving any other items of interest that may occur, until business over the country becomes more settled."

C. P. Dewey had held certificates of deposit in this bank for $3,000 since September, 1893. He had frequently called on the bank to pay the same, but the bank was unable to do so, and it still owed both C. P. and A. B. Dewey each certificates of deposit of $3,000, or a total of $6,000 at the time it failed; and during none of the time between September, 1893, and the time the bank failed, had they ever been able to collect these certificates of deposit. One of C. P. Dewey's certificates of deposit for $1,000 was sent out in the spring of 1895 by express. The express agent had a certificate of deposit of his own and he collected that first, and when he presented the C. P. Dewey certificate the bank was unable to pay it and it was returned.

This was the only certificate sent by express. Before that they had been sent in the usual way, by mail or to the bank. (C. P. Dewey's evidence, p. 273.)

The various letters of complaint and criticism from the comptroller's office were sent to the Deweys for inspection and examination. They kept in close touch with the bank and knew exactly what was going on and knew the nature and character of the bank's assets perfectly, and therefore must have known of their worthless character.

It is rather a remarkable coincidence that C. P. Dewey thought so much of Chicago real estate in December, 1894, but he seemed to have gotten a sufficient amount of this real estate as soon as he had disposed of all his bank stock. The only real estate that he traded for or purchased at about that time or any time since then was simply what he could trade his bank stock for, no more, no less. He traded no other stocks of any kind on this real estate, except the First National Bank stock of Orleans. (C. T. Killen's evidence, pp. 222, 223.)

Let it be remembered that when the Deweys purchased their stock from Burton & Harvey they guaranteed all the notes in the bank and that the bank should always pay ten per cent dividends. Yet they traded it for unimproved outside lots that produced no revenue.

To sum up: Insolvency of the bank in 1894 and 1895 is shown conclusively.

(1.) For the last four or five years that the bank existed, its principal business was renewing old notes that had been in the bank for years, occasionally collecting interest thereon.

(2.) The capital of the bank was $50,000. Of this over $30,000 was loaned directly and indirectly to Burton & Harvey, and was wholly uncollectible.

(3.) Over $15,000 was tied up in a bank building, furniture, and fixtures, which, several years later, in better times, did not prove to be worth a fraction of that sum.

(4.) Some $68,000 of loans and discounts which were in the bank when it failed were the same notes that were in the bank at the time of the stock transfers, and, were worthless.

(5.) During the years 1895 and 1896, only about $1,000 of miscellaneous deposits were in the bank.

(6.) The bank was kept alive after Dewey sold his stock by the use of $20,000 of state money, $4,000 of Harlan county money, and $6,000 loaned by the Deweys. *The state and county moneys were in the bank in violation of law, and were a source of danger rather than of security.*

It is equally clear that C. P. Dewey knew the bank was insolvent.

(1.) In 1891, the Deweys and C. M. Hogg acquired 260 shares of the stock of the bank, a controlling interest, and they had a controlling interest at the time of the transfers.

(2.) The Deweys operated in unison in the management and control of the bank and in disposing of their stock.

(3.) The Deweys took an active part in the management, conduct and policy of the bank, attending each of the stockholders' meetings, and often visiting the bank.

(4.) They were supplied with numerous lists of all of the loans and discounts of the bank.

(5.) During the years 1893 and 1894, the cashier of the bank sent them frequent reports of its condition.

(6.) In March, 1894, they wrote to Burton that they had been "advancing large sums of money to bolster up and keep *Burton & Harvey and the bank running.*"

(7.) At the time of the transfers, Burton & Harvey, who

owed the bank over $30,000, were indebted about $25,000 to the Deweys, and the latter held all of the assets of Burton & Harvey as security. They knew that Burton & Harvey were unable to pay taxes or interest and that their paper, held by the bank, was worthless.

(8.) Their letter of March 26, 1894, shows that they knew that to keep the bank running they had to bolster up Burton & Harvey, debtors to them personally, whom they knew to be insolvent.

(9.) During the years 1893 and 1894, C. P. Dewey loaned to the bank several thousand dollars to keep it afloat, but he required collateral security, and when the bank failed, it owed him $3,000, he had not been able to collect.

Finally, the purpose of the transfers was to escape the obviously impending liability.

(1.) C. P. Dewey was so eager to get rid of the stock that he advertised it for trade for real estate, offering to assume encumbrances.

(2.) He traded for encumbered lands of speculative value, assuming encumbrances, and hoping to come out even, or with as little loss as possible, so at any event he was rid of the stock.

(3.) The transferrees took the stock without inquiry and without caring about its value, desiring to get rid of encumbrances and liability for deficiency.

(4.) The transfers by both the Deweys were so made as to show a simultaneous and systematic effort by both to dispose of their holdings. A. B. Dewey says that such was the fact and that the transfers were made under the advice of an attorney, for the express purpose of evading liability.

We submit that these several circumstances demonstrate

the insolvency of the bank, Dewey's knowledge thereof, his purpose to evade liability. The question before court is whether his plans to that end shall receive judi sanction.

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